DIVISION III

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
TERRY CRABTREE, JUDGE

CA CR 05-1220

June 21, 2006

APPEAL FROM THE CIRCUIT COURT OF PULASKI COUNTY
[NO. CR 2004-4446]

DEMETRIUS HEGWOOD
APPELLANT

HONORABLE WILLARD PROCTOR, JR., JUDGE

V.

AFFIRMED IN PART; DISMISSED IN PART

STATE OF ARKANSAS
APPELLEE

In a bench trial, appellant Demetrius Hegwood was found guilty of aggravated assault on a family or household member for which he was placed on probation for three years, fined $350, ordered to pay court costs, and ordered to attend anger management classes. Appellant presents two issues for our consideration. First, he contends that the evidence is not sufficient to support the conviction because the trial court improperly considered a prior inconsistent statement as substantive evidence. As his second issue, he argues that the trial court erred in denying his motion for reconsideration in which he challenged the amount of court costs he was ordered to pay. We affirm in part and dismiss in part.

The offense of aggravated assault on a household member is codified at Ark. Code Ann. § 5-26-306(a) (Repl. 2006). This statute provides that a person commits this offense if, under circumstances manifesting extreme indifference to the value of human life, the person purposely engages in conduct that creates a substantial danger of death or serious physical injury to a family or household member. A person acts purposely with respect to his or her conduct or a result of his or her conduct when it is the person's conscious object to engage in conduct of that nature or to cause the result. Ark. Code Ann. § 5-2-202(1) (Repl. 2006). Intent or purpose to commit a crime

is seldom proven by direct evidence, and often is inferred from the circumstances. *Alexander v. State,* 78 Ark. App. 56, 77 S.W.3d 544 (2002). Thus, a presumption exists that a person intends the natural and probable consequences of his acts because of the difficulty in ascertaining a person's intent. *Id.*

This court has repeatedly held that, in reviewing a challenge to the sufficiency of the evidence, we view the evidence in a light most favorable to the State and consider only the evidence that supports the verdict. *Edmond v. State,* 351 Ark. 495, 95 S.W.3d 789 (2003). We affirm a conviction if substantial evidence exists to support it. *Fairchild v. State,* 349 Ark. 147, 76 S.W.3d 884 (2002). Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Carmichael v. State,* 340 Ark. 598, 12 S.W.3d 225 (2000). Circumstantial evidence may provide the basis to support a conviction, but it must be consistent with the defendant's guilt and inconsistent with any other reasonable conclusion. *Edmond v. State, supra.* On appeal, this court does not weigh the evidence presented at trial, as that is a matter for the fact-finder; nor do we assess the credibility of the witnesses. *Garner v. State,* 82 Ark. App. 496, 122 S.W.3d 24 (2003).

The aggravated-assault charge in this case stemmed from an automobile collision that occurred in the parking lot of an apartment complex in Sherwood, Arkansas, on August 21, 2004. The victim of the alleged assault was Amanda Phillips, appellant's wife and the mother of his three children. Ms. Phillips testified that she and appellant had argued over the telephone that afternoon. She said that appellant was at work when this conversation took place and that he told her that they would take the matter up once he got home from work, where he was scheduled to get off at 10:00 p.m. At around 9:30 p.m., she and the children were in her vehicle, a 1994 Cadillac, and they met appellant in his vehicle, a 1990 Mazda, at a stop sign in the parking lot. Ms. Phillips testified:

> And he stopped and let me proceed through first, and I passed the apartment and he was following behind me. He thought I was going to the mail box. I kept past the mailbox, and that's when he turned in front of me and tried to get me to stop. And I put the car in reverse, backed up and went around the apartment complex, in the back of the apartment complex, and he came toward the front. That's where we

> hit head on. And I then backed up and proceeded through, leaving out the apartment, and he was behind me and that's when I met with the police.

Ms. Phillips maintained that appellant did not purposely ram into her car, saying "we met up. We just hit." She also testified that she had called the police while she was in the parking lot, and when asked if she had been scared, she replied that she had high blood pressure and had not been feeling well that day, that she did not feel like arguing, and that calling the police was the only thing that would make appellant leave her alone. She also recalled that appellant jumped on the hood of her car at one point during the ordeal in an effort to get her to roll the window down and talk to him. She said that appellant "was trying to get me to stop the car. He thought it would make me stop, but it wouldn't."

The prosecutor asked Ms. Phillips if she had given a statement to the police after the incident. She confirmed that she had given a statement and that she had told the police that appellant had threatened her on the telephone during the argument. She explained, however, that appellant had merely told her that they would "take it up when he get home." When asked if she had told the police that appellant had cussed at her, she responded that appellant was only trying to figure out why she would not stop and talk to him. She testified that she read his lips and that he was saying "what the fuck am I doing or something." Ms. Phillips testified that she did not think that she had told the police that the collision was accidental.

Photographic evidence showed damage to the right headlight area of Ms. Phillips' vehicle. A photograph of appellant's vehicle showed that the hood of the car was buckled considerably.

Officer Keith Finch made contact with Ms. Phillips at a nearby bank between 9:30 and 9:45 p.m. He said that she was crying and "very visibly upset." He said that the children were also crying and quite shaken up. Detective David Smith heard a dispatch about the incident while he was riding in an unmarked car with his wife, and he spotted appellant's vehicle at a stop light. Smith activated his blue lights, and he testified that appellant was traveling at such a high rate of speed that he traveled two miles before he was able to catch up with appellant.

Appellant testified that he did not intentionally hit Ms. Phillips' car. He said that she went around the building one way, while he went around it the other way, and that their vehicles met at the corner. Appellant testified that at first he thought she was going to the mailbox and that he stood in front of her car. He said that he jumped on the hood of the car so that she would stop so he could speak to her and tell her that he was not upset with her. He said that she was on the telephone in the car and that she was not paying any attention to him. He said that he was not angry with Ms. Phillips, and that he was not yelling and cussing.

After appellant moved for a directed verdict, the trial court proceeded to make its findings, during which the following occurred:

> THE COURT: I'm going to find him guilty of aggravated assault on family or household member. Looking at the testimony of Ms. Phillips in this case, the statement that she made to the police and the condition that the police officer found her in are consistent with what the pictures show in terms of damage and that's - - it appeared to be -
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> DEFENSE COUNSEL: Judge, I would point out that statement can't be used. That was just - - it cannot be used as substantive evidence, Judge, her statement to the police. It's only to be used as impeachment. It was never introduced by the State, and the only evidence you have in front of you is the pictures and the testimony. But that statement she made to the police cannot be used as substantive evidence. It's impeachment, but not substantive evidence.
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> THE COURT: Well, I think it - - you're right. It can't be used for - - it's to show that she made a prior inconsistent statement, other than the statement that she made to the police. And that inconsistent statement is more consistent with what the facts of the case appear to be, and that being that it appeared that there was some sort of confrontation between the two of them at the parking lot and there was - - the damage is shown to the front of the car. Coupled with the fact that the defendant got on top of the car and coupled with the fact that there was some sort of disagreement or argument all lead to my belief beyond a reasonable doubt that there was intent on his part to engage in behavior that manifested an extreme indifference to the value of human life given the fact that he could have injured - - could have led to serious physical injury, this incident in the parking lot.
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> I think there was testimony as well that the collision was not at a small rate of speed, but it was a fairly - - not high rate of speed, but it was not just a small little, you know, bump or something along those lines. So, there was, in fact, some sort of collision.

Appellant's first argument on appeal is couched in terms of questioning the sufficiency of the evidence. Appellant contends that the trial court impermissibly considered Ms. Phillips' statement to the police as substantive evidence, and without which, there is no substantial evidence to support the finding of guilt. We disagree.

By rule, prior unsworn statements made by a witness cannot be introduced as substantive evidence in a criminal case to prove the truth of the matter asserted therein. Ark. R. Evid. 801(d)(1); *See also Kennedy v. State,* 344 Ark. 433, 42 S.W.3d 407 (2001); *Hinzman v. State,* 53 Ark. App. 256, 922 S.W.2d 725 (1996). However, in this case when appellant raised his objection, the trial court agreed that the prior statement was not to be used as substantive evidence. From the court's overall remarks, it is clear to us that the trial court based its finding of guilt on the testimony and evidence introduced at the trial and that the trial court did not make substantive use of the prior statement to the police.

Further, we hold that there is substantial evidence to support the verdict. The record reflects that appellant and Ms. Phillips argued over the telephone earlier that afternoon. Ms. Phillips and the children were in their vehicle at 9:30 p.m., at a time when Ms. Phillips expected appellant to still be at work. The evidence further shows that there was a chase in the parking lot of the apartment complex, during which appellant jumped onto the hood of Ms. Phillips' car. The record also demonstrates that appellant's vehicle struck that of Ms. Phillips head on and with sufficient force to buckle the hood of his car. Ms. Phillips also called the police and drove to a neutral location. Appellant also left the parking lot and was soon thereafter seen traveling at a high rate of speed. If this had been a mere accident, then there would have been no reason for either of them to have fled the scene. Moreover, Ms. Phillips and the children were visibly upset and shaken right after the incident occurred. We, therefore, find no merit in appellant's challenge to the sufficiency of the evidence.

Appellant's second argument is that the trial court erred in denying his motion for reconsideration in which he argued that the court costs he was required to pay were excessive.

Because appellant did not file a timely notice of appeal from the denial of that motion, we dismiss on this point.

The judgment and disposition order in this case was filed on July 19, 2005. Rule 33.3(b) of the Arkansas Rules of Criminal Procedure requires post-trial motions to be filed within thirty days after the entry of judgment. Appellant did so by filing his motion for reconsideration on July 27, 2005. The trial court took no action on the motion, and according to Rule 2(b)(1) of the Arkansas Rules of Appellate Procedure - Criminal, the motion was deemed denied on the thirtieth day after its filing. Appellant, however, filed his notice of appeal on August 10, 2005, prior to the expiration of that thirty-day period. This notice of appeal was effective to appeal the judgment of conviction, but was not effective to appeal the denial of the motion for reconsideration. Ark. R. App. P. - Crim. 2(b)(2). To appeal the denial of the motion for reconsideration, appellant was required to file an amended notice of appeal within thirty days from the date the motion was deemed denied. *Id.* Because appellant did not amend the previously-filed notice of appeal, we lack jurisdiction to decide this issue. *Davis v. State,* ___ Ark. App. ___, ___ S.W.3d ___ (Feb. 15, 2006).[1]

Affirmed in part; dismissed in part.

VAUGHT and BAKER, JJ., agree.

[1] One might equate the required payment of allegedly excessive costs to an illegal sentence, which is an issue that can be raised for the first time on appeal from the judgment, even when no objection was raised below. *Ewings v. State,* 85 Ark. App. 411, 155 S.W.3d 715 (2004). We seriously question whether this is so. We point out, however, that an illegal sentence is one that is illegal on its face. *Id.* The judgment here, instead of specifying a dollar amount, merely stated "Yes" in the space provided for court costs. As the requirement of costs is authorized by statute, there is no facial illegality to the judgment.